Nos. 240 and 321

In the Supreme Court of the United States

OCTOBER TERM, 1964

LOCAL UNION NO. 189, ETC., AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

JEWEL TEA COMPANY, INC.

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., ET AL., PETITIONERS

v.

JEWEL TEA COMPANY, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AMICUS CURIAE

ARCHIBALD COX,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

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These cases raise important unresolved questions concerning the interplay between the National Labor Relations, Sherman, and Norris-La Guardia Acts in situations involving multi-employer or market-wide

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collective bargaining. Their clarification would facilitate collective bargaining in a number of industries.

The action was brought by the respondent, Jewel Tea Company, against seven local unions of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, and an association of employers in the Chicago area, known as Associated Food Retailers, alleging a conspiracy to violate Sections 1 and 2 of the Sherman Act. Jewel and the members of the Association operate retail food stores in the Chicago area, which sell fresh and frozen meats (among other products). Amalgamated, through one of the locals, is the bargaining representative of the employees who process, wrap, handle and sell the meat at the various stores. For many years the collective bargaining agreements governing the meat departments in retail stores had established limitations on working and marketing hours. In 1957, 1959, and 1961 those provisions were the subject of intensive discussion, but Amalgamated ultimately prevailed in its demand that Associated Food Retailers and other stores execute a collective bargaining agreement containing the stipulation that (Pet. No. 240, 15a)—

> Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above.

Jewel also signed a contract containing this stipulation, but subsequently it brought the present action attacking the clause as a conspiracy among labor and non-labor groups in violation of the Sherman

Act. The district court held that there was no violation of the Sherman Act because "the purport, history, and effect of the converted provision indicates that it is within the labor exemption of the Sherman Act * * * and that it imposed no 'unreasonable' restraint on trade" (R. 678). The court of appeals reversed, holding (Pet. No. 240, 7a)—

> The hours of the day when his business is to be open to accommodate the demands of customers, in the judgment of the owners of the business, is not a condition of employment * * *. As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business, engaged in handling products in the course of interstate commerce, is a violation of the Sherman Act, and not entitled to the exemption therefrom claimed by the defendant unions in this case.

The decision below, which we believe to be erroneous, is of concern to the United States for three reasons.

First, although, strictly speaking, it interprets only the phrase "terms or conditions of employment" in Section 13(c) of the Norris-La Guardia Act, its necessary implication is to limit the scope of the subjects of mandatory collective bargaining under Sections 8(a)(5) and 8(d) of the National Labor Relations Act. Not only are the words of the two statutes so

similar as to make a difference in interpretation unlikely,[1] but also the court below expressly held that the determination of what days and hours a business will be open is one of the proprietary functions of management with which collective bargaining may not be concerned (Pet. No. 240, 6a).

Second, the decision below curtails the permissible scope of collective bargaining by subjecting to liability to an injunction and damages unions and employers who reach a negotiated agreement concerning such topics.

Third, uncertainty concerning the application of the Sherman Act to multi-employer agreements upon subjects which have been a familiar part of collective bargaining but which might be designated as involving "proprietary functions" under the decision below, is bound to have an unsettling effect upon many

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[1] Section 13(c) of the Norris-La Guardia Act, 29 U.S.C. 113(c), defines "labor dispute" to include any controversy concerning "terms or conditions of employment * * *." Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), read in conjunction with Section 9(a), to which it refers, makes it an unfair labor practice for an employer to refuse to bargain collectively with a representative of his employees with respect to "wages, hours of employment, or other conditions of employment * * *." Section 8(d) of the Labor Act defines collective bargaining as meeting and conferring by an employer and the representative of employees "with respect to wages, hours, and other terms and conditions of employment * * *." The meaning of the words "terms and conditions of employment" and "conditions of employment" in the National Labor Relations Act will be discussed in the brief of the National Labor Relations Board to be filed shortly in *Fibreboard Paper Products Corporation* v. *National Labor Relations Board*, No. 14, this Term.

labor-management negotiations. While we have no reason to believe that the decision, if unreversed, will produce immediate crises, it seems apparent that clarification of the application of the Sherman Act to multi-employer bargaining will avoid potential difficulty.

The issues raised by the decision below are closely related to some of the questions presented in *United Mine Workers of America* v. *Pennington,* No. 48, this Term. We have not filed a brief *amicus curiae* in the *United Mine Workers* case because it involves a number of peculiar facts and also because the antitrust issues appear to turn chiefly upon the detailed analysis of a voluminous record. If certiorari is granted in the present cases and they are set down for argument with *United Mine Workers* v. *Pennington,* we would expect to file in the present cases a comprehensive statement of the principles—so far as here relevant—which the United States believes should govern the application of the antitrust laws to multi-employer collective bargaining.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

SEPTEMBER 1964.

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